

**United States Department of Labor
Employees' Compensation Appeals Board**

V.B., Appellant)

and)

SOCIAL SECURITY ADMINISTRATION,)
SOUTHEASTERN PROGRAM SERVICE)
CENTER, Birmingham, AL, Employer)

Docket No. 09-467
Issued: October 19, 2009

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 5, 2008 appellant filed a timely appeal from the January 31, 2008 merit decision of the Office of Workers' Compensation Programs' hearing representative, who affirmed the denial of her emotional condition claim for failure to establish a compensable factor of employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office's August 12, 2008 nonmerit decision, denying appellant's July 31, 2008 request for reconsideration.

ISSUES

The issues are: (1) whether appellant sustained an emotional injury in the performance of duty; and (2) whether the Office properly denied her request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 6, 2007 appellant, then a 41-year-old benefit authorizer, filed a claim alleging that she sustained an emotional injury on June 12, 2007 when her supervisor met with her to advise that she was being placed on a performance assistance plan. She stopped work on June 21, 2007. Appellant received a principal diagnosis of major depressive episode, recurrent, severe and panic disorder without agoraphobia.

Appellant focused her claim on an assistant manager, Velda Kennedy. She stated that she had no problems the prior year under a different management team. However, in January 2007, there was a change in management and Ms. Kennedy began to come to appellant's desk on a daily basis and make snide remarks. Ms. Kennedy would come to appellant's desk several times a day to ask if she had finished her listings. She allegedly made inappropriate remarks. Appellant stated that she was constantly the butt of Ms. Kennedy's jokes.

Appellant described an incident in which Ms. Kennedy asked her to screen out 20 cases. Ms. Kennedy came back to appellant's desk periodically to inquire whether she needed help. Appellant found herself having to leave work earlier than expected and did not finish the screening. A review of the screenings found that not everything that needed to be done was done on the cases and only one of nine was correct. Appellant felt singled out. "Ms. Kennedy put so much pressure on me she made me feel rushed and anxious to complete the assignment." After additional reviews of her work, appellant advised Ms. Kennedy that she was creating a hostile work environment and causing undue stress. She found it very stressful to have her screening cases reviewed.

Although two reviewers told her that she was doing well, appellant became very nervous when Ms. Kennedy advised that she wanted a meeting on Monday, June 12, 2007.¹ "I was very nervous that weekend I could not sleep. I lost my appetite and did not want to do anything that I normally enjoy doing." At the meeting on Monday, Ms. Kennedy advised that she was placing appellant under a performance assistance plan. "I was truly in shock and had a panic attack. I sat there in a shocked state at first repeating I don't understand! I don't understand. I started crying and during the time that I was crying I had an anxiety attack. I also experienced a panic attack. My heart was racing and I experienced a shortness of breath. I had to take out my inhaler to try to sustain my normal breathing." After the meeting, appellant stayed in the conference room a few minutes and subsequently went to the nurses' station.

A week later Ms. Kennedy delivered the performance assistance plan to appellant: "The PA virtually told me that I would be a trainee again and I would be evaluated to see if I would be fired in 60 days. I became so upset and depressed. I began to have problems completing a single task. I became confused. I called my doctor because I was not feeling like myself." Appellant left to see her physician. "I started experiencing uncontrolled crying. I had a panic attack on the way to the doctor also and when I reached the doctor's office my [blood pressure] was 173/112. I was confused and in a lot of pain."

¹ June 12, 2007 was a Tuesday.

Appellant did not receive an exemplary contribution or service award. She filed a complaint with the Equal Employment Opportunity Commission (EEOC) on the basis of race, disability, sex, nonsexual harassment and hostile work environment.

Ms. Kennedy denied appellant's allegations. She contended that she called appellant into the conference room on April 12, 2007² to notify her that she was being placed on a performance assistance plan. Ms. Kennedy had received feedback indicating that appellant's processing of cases was unacceptable and she had observed some inaccuracies in appellant's casework. "As we were ending our meeting, [appellant's] eyes became watery. She told me that she did not want to return to the module with tears in her eyes. I suggested that she remain in the room, go to the library, nurses' station or walk around the building until she thought she was ready to return."

In a decision dated October 9, 2007, the Office denied appellant's claim for failure to establish fact of injury. It found that she failed to substantiate her allegations that Ms. Kennedy singled her out or treated her differently or made her the butt of inappropriate jokes. "The only substantiated factor seems to be that you had a discussion with Ms. Kennedy about your performance."

Appellant requested a review of the written record by an Office hearing representative. She submitted additional medical evidence and a 1999 finding that she was entitled to Social Security disability benefits beginning 1998 due to her affective disorder.

In a decision dated January 31, 2008, the Office hearing representative affirmed the denial of appellant's claim. The hearing representative found that appellant failed to establish any compensable factor of employment.

On July 31, 2008 appellant requested reconsideration. She submitted evidence to show that her Equal Employment Opportunity (EEO) claim for discrimination and workplace harassment was accepted. Appellant stated that she could not afford to keep paying her medical copays. She submitted medical reports, which mentioned that her depression and stress were work related. Appellant addressed her daughter's former mental disability. She repeated allegations that Ms. Kennedy frequently visited her desk and harassed her about work assignments. Appellant stated that Ms. Kennedy ran people away from her desk who were helping her as part of their job. She stated that Ms. Kennedy made jokes about her in a meeting when she did not spell a word correctly on an anonymous suggestion and complaint form regarding poor morale. "She did this in front of all the employees."

In a decision dated August 12, 2008, the Office denied further reconsideration of the merits of appellant's case. It found that she submitted no relevant evidence to establish any compensable factors of employment.

² April 12, 2007 was a Thursday.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ An employee seeking benefits under the Act has the burden of proof to establish the essential elements of her claim.⁴

Workers' compensation does not cover each and every illness that is somehow related to employment. Workers' compensation does not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.⁵ The Board has held that actions of an employer which the employee characterizes as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that harassment or discrimination did in fact occur. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁶ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.⁷ The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.⁸

ANALYSIS -- ISSUE 1

On appeal, appellant argues that the EEOC determined that her complaint had enough substance to go forward with an investigation. She repeated the content of her reconsideration request and addressed Ms. Kennedy's attitude and the effect it had on her.

Appellant attributed her diagnosed psychological condition to the actions of an assistant manager, Ms. Kennedy and in particular, to a meeting in which Ms. Kennedy notified her that she was being placed on a performance assistance plan. As a general rule, workers' compensation does not cover an employee's emotional reaction to an administrative or personnel action, whether it is how a manager reviews an employee's work or tries to improve performance

³ 5 U.S.C. § 8102(a).

⁴ *John J. Carlone*, 41 ECAB 354 (1989).

⁵ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

⁶ See *Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

⁷ *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

⁸ *Paul Trotman-Hall*, 45 ECAB 229 (1993) (concurring opinion of Michael E. Groom, Alternate Member).

or whether it is a decision to place an employee on a performance assistance plan or deny an award. However, error or abuse in an administrative or personnel matter may afford coverage under the Act. Appellant must establish that Ms. Kennedy committed an administrative error or specific abuse against her. An employee's allegations, alone, are generally insufficient to establish administrative error or abuse as a matter of fact. Appellant believes Ms. Kennedy did something wrong, but her belief alone does not prove it so. Her perceptions or feelings of harassment or discrimination must be substantiated by probative and reliable evidence.

The Office found that appellant failed to submit probative and reliable evidence to support her allegations that Ms. Kennedy committed some administrative error or abuse against her. It has reviewed the evidence of record and finds no evidence to support her allegations of administrative error or abuse. Ms. Kennedy denied appellant's allegations. Medical evidence that her condition is "work related" is no proof of the allegations made against Ms. Kennedy; it merely reflects the history appellant provided her physicians. Appellant has pursued her allegations of harassment and discrimination through the EEOC and her complaint apparently was deemed sufficient to proceed to investigation. However, there is no evidence that the EEOC has made any final decision in her case or determination that Ms. Kennedy committed an administrative error or specific abuse against her. As currently assembled, the record on appeal does not substantiate appellant's allegations against Ms. Kennedy to show that her claim falls within the exception to the general rule that workers' compensation does not cover an employee's emotional reaction to an administrative or personnel action. Appellant bears the burden of proof to establish her entitlement to benefits under the Act. The Board finds that she has not met that burden of proof. The Board will therefore affirm the Office hearing representative's January 31, 2008 decision.

LEGAL PRECEDENT -- ISSUE 2

The Act provides that the Office may review an award for or against payment of compensation at anytime on its own motion or upon application.⁹ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."¹⁰

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹¹

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.605.

¹¹ *Id.* at § 10.606.

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.¹² A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹³

ANALYSIS -- ISSUE 2

Appellant made her July 31, 2008 request for reconsideration within one year of the Office hearing representative's January 31, 2008 merit decision. The request is therefore timely. To support her request, appellant stated that she was submitting evidence to show that her EEO claim for discrimination and workplace harassment was accepted. However, as noted, accepting that an EEO claim is sufficient to proceed to investigation is short of a final decision by the EEOC that substantiates either an administrative error or specific abuse.

Appellant submitted medical evidence mentioning that her depression and stress were work related; however, this is not proof of administrative error or abuse. Her remarks about her ability to keep paying her medical copays, about her daughter's former mental disability and about Ms. Kennedy's actions towards her are not relevant or pertinent to the grounds upon which the Office denied her claim. To require the Office to reopen appellant's case for a merit review of the evidence, she must submit probative and reliable evidence that Ms. Kennedy committed an administrative error or specific abuse against her. Appellant has previously made the allegations; repeating them does not address the basic deficiency of her claim, namely that she has failed to substantiate her allegations with probative and reliable evidence.

Appellant's July 31, 2008 request for reconsideration did not show that the Office erroneously applied or interpreted a specific point of law. It did not advance a relevant legal argument not previously considered by the Office. It did not provide relevant and pertinent new evidence not previously considered by the Office. Because appellant's her request did not meet at least one of the three standards for obtaining a merit review of her case, the Board finds that the Office properly denied her request. The Board will affirm the Office's August 12, 2008 decision.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained an emotional injury in the performance of duty. The Board also finds that the Office properly denied her July 31, 2008 request for reconsideration.

¹² *Id.* at § 10.607(a).

¹³ *Id.* at § 10.608.

ORDER

IT IS HEREBY ORDERED THAT the August 12 and January 31, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 19, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board